

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE RAMON MORA,

Defendant-Appellant.

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UNPUBLISHED  
October 17, 2000

No. 220570  
Berrien Circuit Court  
LC No. 98-404472-FH

Before: White, P.J., and Talbot and R. J. Danhof\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of possessing 650 grams or more of a mixture containing cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), and sentenced to serve parolable life imprisonment. He appeals as of right. We affirm.

Defendant first argues that the prosecution failed to prove beyond a reasonable doubt that he possessed or aided and abetted the possession of cocaine. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowak*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court's review is deferential, drawing all reasonable inferences and making credibility choices in support of the jury's verdict. *Id.* at 400; *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of unlawful possession of a controlled substance (cocaine) are that (1) defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) defendant knew that he was possessing cocaine, and (4) the substance was in a mixture that weighed 650 or more grams. CJI2d 12.5; *Wolfe, supra* at 516-517. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The evidence, when viewed in light of these legal principles, supports the jury's verdict. Possession may be either actual or constructive, and may be joint, with more than one person actually

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

or constructively possessing a controlled substance. *Wolfe, supra* at 520. Defendant was the occupant of an automobile containing marijuana and a large amount of cocaine that expert testimony suggested could only have been intended for resale. The arresting officer testified that defendant's nervousness escalated rapidly when the officer indicated that he was about to search the automobile's trunk, that defendant and his companion eyed the trunk and each other in a suspicious manner, and that they slouched down while in the back seat of the patrol car. Furthermore, defendant—but not his companion—possessed a pager, and a police officer, testifying as an expert witness, opined that large-scale drug dealers uniformly possess pagers, a fact that the Court in *Wolfe, supra* at 525, cited as relevant to a finding of possession. Also relevant is the fact that defendant's companion was a drug user, and the police expert testified that drug dealers customarily do not allow drug users to transport drugs unless they are accompanied by someone who does not use drugs, as occurred in this case, where defendant claimed not to use drugs. Finally, the absence of any luggage in the suspects' vehicle belies the possibility that the men were going to visit friends in Detroit for any extended period of time. Accordingly, we conclude that sufficient evidence was presented to support beyond a reasonable doubt defendant's conviction for possession of the cocaine.

Defendant next claims that the prosecutor improperly utilized drug profile evidence as substantive proof of guilt, introduced and argued improper opinion evidence regarding his guilt, and injected into the proceedings his personal belief that defendant was guilty. Where, as here, forfeited nonconstitutional error is alleged, the “defendant must show a plain error that affected substantial rights. A reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Carines, supra* at 774.

We do not agree that the prosecution improperly used profile evidence as substantive evidence of defendant's guilt. “Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale.” *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). “Such evidence ‘is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity.’” *Id.* at 53, quoting *United States v Lim*, 984 F2d 331, 334-335 (CA 9, 1993). See also *People v Hubbard*, 209 Mich App 234, 241-242; 530 NW2d 130 (1995). “Clearly, there is often a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence; the admissibility of profile evidence must effectively be determined case by case.” *Murray, supra* at 54-55. Four factors have been cited as helpful in determining the admissibility of drug profile evidence in a particular case. *Murray, supra* at 56. “First, the reason given and accepted for the admission of the profile testimony must only be for a proper purpose—to assist the jury as background or modus operandi explanation.” *Id.* “Second, the profile, without more, should not normally enable the jury to infer the defendant's guilt.” *Id.* at 57. “Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence. Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony.” *Id.* “Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied.” *Id.*

Our review of the evidence warrants the conclusion that the drug profile evidence was admissible as background or modus operandi evidence and did not embrace the ultimate issue of defendant's guilt. See *Murray, supra* at 59; *People v Griffin*, 235 Mich App 27, 44-46; 597 NW2d 176 (1999). The police officer who testified as an expert witness concerning indicia of drug trafficking stated that it was possible for a drug user such as defendant's companion to transport drugs for a drug dealer, but only if accompanied by someone who did not use drugs. This information was not within the lay person's common knowledge and was useful to the jury to correct the possible error in thinking that if narcotics were found in a vehicle and one of the occupants was a drug user, the drugs must clearly belong to that person. Furthermore, the expert witness' testimony that drug dealers customarily carry pagers must be considered in the context of his explanation that the purpose of such pagers was to permit customers to call the dealer and leave the caller's telephone number and the dollar amount of the drugs the person wished to purchase. This evidence satisfies the four factors enunciated in *Murray, supra*. First, the reason for the introduction of this evidence was proper, i.e., to assist the jury as background for modus operandi explanation. Second, plaintiff did not rely exclusively on profile evidence to convict defendant; rather, the prosecutor also introduced and argued additional evidence from which the jury could draw an inference of criminality. Third, although the trial court did not give a limiting instruction to the jury regarding the proper and limited use of profile testimony, no such instruction was requested by defense counsel, and it is therefore difficult to fault the court's omission. Finally, the expert witness did not express his opinion, based on a profile, that defendant was guilty, and did not expressly compare defendant's characteristics to the profile in such a way that guilt was necessarily implied. Although the prosecutor, during closing argument, referred to the expert witness' testimony that drug dealers do not let drug users transport drugs unless accompanied by a non-user, no error necessitating reversal occurred under the *Carines* standard even if this comment is regarded as contrary to the dictates of *Murray*. In summary, no prejudicial error resulted from the prosecutor's use of profile evidence at defendant's trial.

Defendant next takes exception to the arresting officer's testimony that, during his encounter with the suspects, they looked at the automobile's trunk, then at each other, later stared at him through the back window of the patrol car, and then slouched down and put their heads down. The prosecutor, in his opening statement, utilized this evidence to conclude, "At that point, given that type of body language, the Deputy was pretty sure that there was something in the trunk." And, during closing argument, the prosecutor referred to the suspects' behavior as indicating guilty knowledge regarding the presence of drugs.

The officer's testimony that the suspects' behavior made him suspicious of their guilty knowledge does not constitute prejudicial error. A non-expert witness may testify regarding opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. MRE 701. In *People v Smith*, 152 Mich App 756, 764; 394 NW2d 94 (1986), this Court approved a police officer's trial testimony that when he first spotted the defendant and his accomplice they were standing "up against the house . . . trying to conceal themselves from the street or any vehicular traffic." After citing MRE 701, this Court observed that the "admission of opinion testimony is within the trial court's discretion," and concluded, "[h]ere the opinion testimony was clearly based on the witness's perception and involved a crucial issue, whether defendant was the victim of a crime or a culprit. We do not believe that the trial court's

discretion was abused.” *Id.* Likewise, although the trial court’s discretion in the present case was never invoked by a defense objection to the officer’s testimony, his narrative regarding the suspects’ suspicious behavior was properly admitted pursuant to MRE 701 and the rationale of *Smith*. No error occurred.

As his final allegation of error, defendant criticizes several comments made by the prosecutor during closing argument. Among these are his statement, “But I also think that defendant Mora possessed [the cocaine].” Defendant also challenges the following remarks by the prosecutor (1) “And I think that’s exactly the situation we have here,” (2) “Clearly, I believe [defendant] smoked, helped smoke, that marijuana in the car on the drive to Detroit,” (3) “Believe me, it wasn’t because [defendant] was tired and getting ready to fall asleep,” and (4) “The defendant knew the cocaine was there. He was in charge of it. He was transporting it to Detroit to sell it.”

Because defense counsel did not object to any of the foregoing statements, the *Carines* standard applies. Some of the challenged statements are simply innocuous references to what the evidence shows, without specifically using the language, “the evidence demonstrates,” or similar verbiage. However, the prosecutor’s assertion that he believed that defendant smoked or helped smoke marijuana in the car on the drive to Detroit appears improper as a personal opinion of defendant’s guilt. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). Generally, expressions of the prosecutor’s personal beliefs necessitate reversal only if they were so prejudicial that their effect could not have been cured by a cautionary instruction. *Id.* at 371. Here, the jury acquitted defendant of the marijuana possession charge. Accordingly, because we are satisfied that defendant was not prejudiced by the remark, reversal is unwarranted.

Affirmed.

/s/ Michael J. Talbot

/s/ Robert J. Danhof